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IN THE

Supreme Court of the United States

October Term, 1969

No. 13

WILLIAM L. MAXWELL,

Petitioner,

v.

O. E. BISHOP, Superintendent of Arkansas State Penitentiary,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICI CURIAE* OF THE SYNAGOGUE COUNCIL OF AMERICA AND ITS CONSTITUENTS (THE CENTRAL CONFERENCE OF AMERICAN RABBIS, THE RABBINICAL ASSEMBLY OF AMERICA, THE RABBINICAL COUNCIL OF AMERICA, THE UNION OF AMERICAN HEBREW CONGREGATIONS, THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, THE UNITED SYNAGOGUE OF AMERICA) AND THE AMERICAN JEWISH CONGRESS

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Interest of the *Amici*

On this appeal from an Arkansas jury's imposition of the death penalty upon a Negro convicted of raping an unmarried woman of thirty-five, the *amici* have sought, and obtained, the consent of the respective parties for the submission of this brief because of their special interest as Jewish organizations in the subject of capital punishment.

The American Jewish Congress is an association of American Jews organized to oppose racial and religious discrimination and to help preserve democratic principles and practices. The other *amici*, all constituents of the Synagogue Council of America, are the recognized rabbinic and congregational representatives of the three branches of American Judaism—Orthodox, Conservative and Reform.

All of the *amici* are opposed as a matter of principle to the imposition of the death penalty and support its abolition. Their position is based on their judgment as to the demands of contemporary American democratic standards, but also has its roots in ancient Jewish tradition. This statement may seem surprising in view of the many references in the Hebrew Bible to the death penalty for such transgressions as adultery (Lev. 20:21), bestiality (Ex. 22:18), murder (Ex. 21:12) and rape of a betrothed (but not of an unmarried or unbetrothed) woman (Deut. 22:15). Indeed, these Scriptural provisions are often invoked by defenders of capital punishment.[1]

1. See, e.g., Vellenga, CHRISTIANITY AND THE DEATH PENALTY; in Bedau, THE DEATH PENALTY IN AMERICA, 124-125 (1967) (hereinafter referred to as Bedau); Hoover, STATEMENTS IN FAVOR OF THE DEATH PENALTY, in *ibid.*, 1933.

These statements, however, reflect an unfamiliarity with the full Jewish tradition, and specifically with the fact that Rabbinic Judaism during the Talmudic period, some two thousand years ago, represents the interpretation and implementation of the Scriptural command. We can fully understand the Scriptures only through their presentation by the Oral Law, of which Talmud is the prime exponent.

The definition and the application of the laws of evidence and criminal procedure in the Talmud made conviction in a capital case practically impossible. Thus, for example, it is noted that if an accused were to be convicted in a capital case the verdict could *not* be unanimous, the reasoning of the Rabbis being that if not a single one of the twenty-three judges constituting the court (Sanhedrin) could find some reason for acquittal there was something fundamentally wrong with the court. Circumstantial evidence was not sufficient to sustain a verdict in a capital case; two eye-witnesses, subjected to rigorous cross-examination by the court, were required. Moreover, the witnesses had to testify that they warned the accused *before* the crime that the act was prohibited and what its penal consequences were. (*Talmud, Sanhedrin,* 40b et seq.)

In view of these procedural requirements it is evident that conviction in a capital case was virtually impossible.[2] But perhaps most indicative of the Rabbinic view of capital punishment is the following from the Talmud (Makkot, Chap. 1, Mishnah 7):

> A *sanhedrin* which executes a criminal once in seven years is called a "court of destroyers." Rabbi Eliezer

2. "It is clear that with such a procedure conviction in capital cases was next to impossible, and that this was the intention of the framers of the rule is equally plain." 2 Moore, JUDAISM, 186 (1927).

ben Azariah states that this is so even if it executes one every seventy years. Rabbi Tarphon and Rabbi Akiba stated that if they had been members of the sanhedrin no one would ever have been executed.

One Rabbi, Simeon ben Gamliel, expressed a contrary view reflecting the most common justification for capital punishment, namely its deterrent effect. If the views of Rabbis Tarphon and Akiba were to prevail, he said, "they would increase murders in Israel." However, later commentaries note that Rabbi Simeon's was a minority view and that the others expressed the normative opinions of the Rabbis. (Maimonides, *Hilkoth Sanhedrin*, xiv., xv.)

To take a human life, the Rabbis said, is a matter of the gravest seriousness. Execution is not reversible. If a mistake is made what has been done is irrevocable. One who takes a human life, they pointed out, diminishes the Divine Image. On occasions this extreme means may be necessary to protect society. But it may be carried out only when there can be absolutely no doubt concerning the guilt of the accused and of his freely chosen, deliberate and knowing act. In view of human fallibility which is so pervasive a factor in all judgments, a drastic step such as terminating a human life was as a practical matter not defensible. (See, 3 JEWISH ENCYCLOPEDIA 554-558 (1912); Mendelsohn, CRIMINAL JURISPRUDENCE OF THE ANCIENT HEBREWS, 116-133.)[3]

3. It is for this reason that Lafayette vowed to oppose capital punishment until "the unfallibility of human judgment" was demonstrated to him. Quoted in statement by Attorney General Ramsey Clark before Subcommittee on Criminal Laws and Procedures of the United States Senate on S. 1760, To Abolish the Death Penalty, July 2, 1968 (hereinafter referred to as Statement on S. 1760).

Question to Which this Brief is Addressed

Petitioner's brief addresses itself to two points: (1) that Arkansas' practice of allowing capital trial juries absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty upon a defendant convicted of the crime of rape violates the Due Process Clause of the Fourteenth Amendment; and (2) that Arkansas' single-verdict procedure, which requires the jury to determine guilt and punishment simultaneously in a capital case violates the Fifth and Fourteenth Amendments.

We support the arguments set forth in the petitioner's brief and associate ourselves with them. In this brief we address ourselves to an aspect of the case not discussed in petitioner's brief, but one which relates specifically to the first point in that brief. If, as we submit it should, this Court sustains the validity of that point it will be required to remand the case to the Arkansas trial jury for reconsideration of the sentence in the light of instructions to it by the trial judge. The specifics of those instructions are of course initially the responsibility of the Arkansas courts, but whatever they are they must be within the limitations of the Federal Constitution. To the extent that they are not, it may be anticipated with reasonable certainty that this case will be back before this Court.

We suggest, therefore, that it is entirely appropriate for the Court to obviate as far as practicable further avoidable appeals by stating in its opinion such minimum constitutional limitations as the Arkansas trial court will

quite clearly and unavoidably be required to cope with in framing its instructions to the jury. The most obvious of these is the appropriateness of the death penalty in a non-homicidal rape case. If the Constitution forbids imposition of the death penalty in a rape case, judicial economy would seem to dictate that the Court say so in its opinion on the present appeal so that the trial judge may act in light rather than in darkness.

This procedure is by no means unprecedented. It is, in effect, the procedure employed in much greater detail in *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

Accordingly this brief *amici curiae* addresses itself to the single question: May a state consistently with the Federal Constitution impose the death penalty upon a person convicted of non-homicidal rape?

Summary of Argument

Under the Eighth Amendment to the Federal Constitution, made applicable to the states by the Fourteenth, a state may not impose punishment which is cruel or unusual. The ultimate responsibility of determining whether punishment is cruel or unusual rests not with the legislature but with the courts, and ultimately of course this Court. In discharging this responsibility the Court is not restricted to standards prevailing in 1789 when the Amendment was framed but should apply contemporary standards. Nor should these standards be limited by considerations of geographic regionalism, but should give weight to national and even international judgments. Moreover, it should consider the efficacy or inefficacy of the death penalty as

a deterrent and should give weight to the usual if not inevitable concommitants of imposition of the death penalty, such as unequal and racially discriminatory imposition. Measured by these standards the death penalty for non-homicidal rape constitutes cruel and unusual punishment within the meaning of the Eighth Amendment.

ARGUMENT

Imposition of the death penalty for non-homicidal rape constitutes cruel and unusual punishment in violation of the Eighth Amendment as made applicable to the states by the Fourteenth.

A. The Constitutionality of the Death Penalty in General

The possible unconstitutionality of the death sentence in all cases is being increasingly asserted among legal writers,[4] not merely under the Eighth Amendment but as a denial of due process. Under the former it has been suggested that contemporary scientific knowledge, not available in 1791 but requiring judicial recognition,[5] establishes that all methods of execution of humans in use in the world today (hanging, shooting, beheading, stoning, electrocution and gas asphyxiation)[6] are physically and

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4. Rubin, *The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty*, 15 CRIME AND DELINQUENCY 121 (1969); Marcus and Weisbrodt, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268 (1968); Gottlieb, *Testing the Death Penalty*, 34 S. CALIF. L.R. 268 (1961).

5. *Cf. Brown* v. *Board of Education*, 347 U.S. 483 (1954).

6. Reckless, *The Use of the Death Penalty*, 15 CRIME AND DELINQUENCY 43, 46 (1969).

psychologically painful to the extent of being cruel and inhumane. Marcus and Weisbrodt, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1326-1343 (1968). It has been urged too that, as the then Attorney General of the United States stated in 1968, "Surely the abolition of the death penalty is a major milestone in the long road from barbarism,"[7] and that accordingly by contemporary standards this Court can and should declare capital punishment to be unconstitutionally cruel and inhumane in all cases. (See Point II of Brief *Amicus Curiae* of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent in *Boykin* v. *Alabama*, 391 U. S. 510 (1968).)

It may also be suggested that, as will be indicated below pp. 35-37), actual consummation of the death penalty even when it is imposed has become so rare that *de facto* if not *de jure* it has become "unusual" within the context of the Eighth Amendment and that the Court should declare it so.

The due process argument has been predicated on the claim that execution of the death penalty renders due process of law inoperable. "When the condemned man is executed, errors in the proceedings are placed beyond the reach of later decisions that would provide new grounds for examining whether the proceedings leading to the execution contained error." Rubin, *The Supreme Court, Cruel and Unusual Punishment and the Death Penalty*, 15 CRIME AND DELINQUENCY 121, 130 (1969). Thus, for example, in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968) the Court held that a jury from which persons not believing in the death

7. Statement on S. 1760.

penalty were excluded was not representative of the community and therefore constitutionally impermissible. The Court held this principle to be retroactive and hence applicable to all persons in death rows all over the country. But as to those who have already been executed reopening and retrial is of course impossible and therefore the inevitable result is that they have been deprived of their lives without due process of law.

Finally, an argument has been made which encompasses both due process and the Eighth Amendment, an argument suggested by *Robinson* v. *California,* 370 U.S. 660 (1962), that the death penalty is not rationally related to any purpose that an American government may constitutionally seek to achieve. The traditional purposes of punishment have been retribution, deterrence, reform, and isolation for the protection of the community. *Rudolph* v. *Alabama,* 375 U.S. 889 (1963), dissenting opinion of Mr. Justice Goldberg; Holmes, THE COMMON LAW (Howe, ed.) 36 (1963). Retribution, it is asserted, is today no longer a valid governmental interest.[8] Capital punishment, as will be indicated more fully below, is overwhelmingly adjudged by competent students not to be demonstrably more effectual as a deterrent than life or long-term imprisonment. Reformation is of course impossible, and isolation can be effectively achieved by confinement. Gottlieb, *Testing the Death Penalty,* 34 S. CALIF. L. REV. 268 (1961); Sellin, THE DEATH PENALTY 69-79 (1959).[9]

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8. "There is no place * * * for punishment for its own sake, the product of vengeance or retribution." *People* v. *Oliver,* 1 N.Y. 2d 152, 160 (1956). See also Holmes, THE COMMON LAW (Howe, ed.) 37 (1963); Marcus and Weisbrodt, *The Death Penalty Cases,* 56 CALIF. L. REV. 1268, 1348-1354 (1968).

9. Of course, execution is more economical than life confinement, but in view of the sanctity of human life it can hardly be contended that this fact should be determinative.

It is not necessary in this case to consider the constitutionality of the death sentence in all cases and under all circumstances, nor even in all cases where the crime for which the condemned was convicted did not result in death. It is sufficient here to limit consideration and judgment to the constitutionality of the death sentence in the one specific case of rape where no death results, and it is to this alone that the present brief is addressed although, of course, all arguments directed at the constitutionality of capital punishment generally are applicable to the specific issue in the present case.

B. Applicability of the Eighth Amendment to the States

Whatever doubts may have previously existed,[10] it is now clear that the Eighth Amendment's prohibition of cruel and unusual punishments is applicable to the states by virtue of the Fourteenth Amendment. *Robinson* v. *California,* 370 U.S. 660, 666 (1962); *Gideon* v. *Wainwright,* 372 U.S. 335, 341-342 (1963); *Malloy* v. *Hogan,* 378 U.S. 1, 6 (1964).

C. Judicial Responsibility

Although, as will be indicated more fully below, there is a steady legislative trend toward the abolition of the death penalty either altogether or generally with a few exceptions (*infra,* p. 34-35), a trend which reflects the mandate of the public conscience, the ultimate responsibility of determining what constitutes cruel and unusual punishment within the meaning of the Eighth Amendment rests not with the legislature but with the courts, and particu-

10. See *Louisiana ex rel. Francis* v. *Resweber,* 329 U.S. 459, 462 (1947).

larly this Court. *Trop* v. *Dulles*, 356 U.S. 86, 103 (1958); *Robinson* v. *California*, 370 U.S. 660 (1962).

D. Excessive Punishment as Cruelty

Rather surprisingly it has been urged that the intent of the Eighth Amendment is solely to forbid cruel and inhumane methods of punishment such as torture or burning at the stake, but not to forbid punishments which are wholly disproportionate to the offense committed. *Weems* v. *United States*, 217 U.S. 349, 382 (1910) (dissenting opinion); Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1074-1075 (1964). This is surprising because it would forbid flogging a person who committed petty larceny[11] or even fining him excessively (since the Amendment specifically prohibits excessive fines),[12] but not imprisoning him for life or even hanging him for it.[13]

It is difficult to believe that the framers and adopters of the Amendment were concerned only about disproportionate monetary punishment but not other and more serious forms of disproportionate punishment.

In any event, the issue is no longer open to question; it is clear today that punishments which are excessively

11. *Jackson* v. *Bishop*, 404 F.2d 571 (1968).

12. The Eighth Amendment was taken bodily from the English Bill of Rights of 1688 (1 W. & M. s. 2, c. 2). The earliest application of the provision in England appears to have been in 1689, just a year after its adoption, in a case in which the King's Bench fined Lord Devonshire thirty thousand pounds for an assault and battery upon Colonel Culpepper. The House of Lords, in reviewing the case, took the opinion of the law Lords, and decided that the fine "was excessive and exorbitant, against Magna Charta, the common right of the subject and the law of the land." *Weems* v. *United States*, *supra*, 217 U.S. at 376.

13. See below footnote 21.

disproportionate to the crimes for which they are imposed are cruel and unusual within the meaning of the Amendment. *Weems* v. *United States*, 217 U.S. 349 (1910); *Robinson* v. *California*, 370 U.S. 660 (1962). It follows from this that even if the Court cannot find that there is no uncruel or humane method of execution of the death penalty[14] and is not prepared at present to hold that the death penalty is in all cases disproportionate to all crimes even those resulting in death, it can, and we submit should hold that it is unconstitutionally disproportionate to the crime of rape which does not result in death.

In discharging its responsibility of interpreting and applying the Eighth Amendment the Court is not confined to the standards prevailing in 1789 when the Amendment was framed. "[T]he words of the Amendment are not precise * * * their scope is not static." *Trop* v. *Dulles*, 356 U.S. at 100-101. Even when the Amendment was debated in Congress on its introduction it was recognized that future courts would give different meanings to the term "cruel." Representative Livermore opposed the Amendment for exactly that reason, stating:

> The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lays with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often

14. *Wilkerson* v. *Utah*, 99 U.S. 130 (1878) (statute authorized trial judge option of sentencing death by shooting, hanging or beheading; Court held shooting is not cruel and unusual); *In re Kemmler*, 136 U.S. 436 (1890) (death by electrocution not cruel and unusual). See also *O'Neil* v. *Vermont*, 144 U.S. 323 (1892).

> deserve whipping, and perhaps having their ears cut off; but are we, in future, to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the legislature to adopt it, but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind. (Cong. Register 225, quoted in Weems v. United States, 217 U.S. at 369).[15]

Livermore spoke of cutting off the ears of criminals, but lest it be assumed that this was merely the product of his imagination, it should be noted that the Constitution itself, or more specifically the Fifth Amendment, appears to contemplate the acceptability of dismemberment as a method of punishment. The Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb,"[16] thus implying the propriety of being *once* put in jeopardy of limb. Blackstone refers to drawing and quartering, disemboweling, beheading, public dissection, burning at the stake, dismembering and branding as forms of punishment practiced in England, notwithstanding the Bill of Rights of 1688, up to a time contemporary with the framing of the Eighth Amendment.[17] Can

15. It is interesting to note that Livermore apparently anticipated a time when hanging, and presumably all other methods of executing the death penalty, would be adjudged unconstitutionally cruel.

16. Gottlieb, *Capital Punishment*, 15 CRIME AND DELINQUENCY 1, 20 (1969).

17. 2 Blackstone, COMMENTARIES, 2620-23 (Jones' ed. 1916). Whipping, held violative of the Eighth Amendment in *Jackson* v. *Bishop*, 404 F. 2d 571 (1968), was specifically prescribed as punishment for a variety of offenses in the first Federal Crimes Act. 1 Stat. 112-117.

it be doubted that no American court would today sanction these methods of punishment in the face of the Eighth Amendment?[18]

E. Inapplicable Standards of Cruelty.

As we have indicated, the Amendment addresses itself not only to the method of punishment but to its proportionateness as well. It no more immunizes from future judicial review punishment deemed in 1789 not to be disproportionate or excessive by the standards then prevailing than it immunizes punishments then acceptable in method or mode of execution. As late as 1837, more than twenty-five offenses, including stealing bank notes, forgery and bigamy were punishable by death in North Carolina.[19] In England, it was not until 1810 that the law making picking pockets a capital offense was repealed.[20] The Crimes Act of 1790 (1 Stat. 112-117), the first Federal penal code, made forging or passing forged public securities punishable by death.

It is inconceivable that this Court would today allow the death penalty to be imposed for these crimes although they were apparently acceptable to the generation that framed and adopted the Eighth Amendment. That Amendment did not fossilize forever the standards of humane conduct prevailing in the 18th century. The matter has been well put by the Court in *Weems* v. *United States* (217 U.S. at 373):

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18. See, *Wilkerson* v. *Utah*, 99 U.S. 130, 135-136 (1878).

19. Bedau, 7. This harsh code persisted so long in North Carolina partly because the state had no penitentiary and thus had no suitable alternative to the death penalty. *Ibid.*

20. *Ibid.*

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principal to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction. * * *

The conclusion to be drawn from this is that the fact that death was deemed a constitutionally acceptable penalty for rape in 1789 when the Eighth Amendment was framed, or 1868 when the Fourteenth Amendment was adopted or even in 1947 when *Louisiana ex rel. Francis v. Resweber* was decided by this Court, does not require the Court to hold today that it is constitutionally acceptable and not violative of the Eighth Amendment. As the Court said in *Weems* (217 U.S. at 378), "The clause of the Constitution

* * * may therefore be progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."

Nor is the Court precluded from adjudging the death penalty for non-homicidal rape to be unconstitutionally excessive by reason of the fact that the legislature has expressly or implicitly found it to be efficacious as a deterrent. As we will show below (p. 25), the scientific evidence is almost unanimously to the contrary; but even if that were not so, the Eighth Amendment does not except from its prohibition such cruel and inhumane punishment as effectively deters others from committing the same crime. If it did, there would be nothing left of the Amendment, for the more cruel the punishment the more effective it would be as a deterrent. Concededly, the state has an interest in deterring rape. But so too does it have an interest in deterring forgery, embezzlement, petty larceny and even traffic violations, and that interest would hardly constitutionally justify imposition of the death penalty for those offenses.[21]

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21. "But, indeed, were capital punishments proved by experience to be a sure and effectual remedy, that would not prove the necessity * * * of inflicting them upon all occasions when other expedients fail. I fear this reasoning would extend a great deal too far. For instance, the damage done to our public road by loaded wagons is universally allowed, and many laws have been made to prevent it; none of which have hitherto proved effectual. But it does not therefore follow that it would be just for the legislature to inflict death upon every obstinate carrier who defeats or eludes the provisions of former statutes * * *" 2 Blackstone's *Commentaries*, 2164-65. (It should be noted, incidentally, that this quotation effectively disposes of the claim that the term "cruel and unusual" as used in the Bill of Rights of 1688 contemplated only the method of punishment and not its excessiveness.)

Today, 17 states and the District of Columbia maintain in their statutes the death penalty for rape.[22] All but one (Nevada) are southern states.[23] The death penalty for rape can therefore truly be said to be a regional or geographic phenomenon. But, we submit, a geographic or regional variation cannot restrict the Court's exercise of judgment in construing and applying the Eighth Amendment any more than can the First or Fourteenth. Indeed, whether or not it was the intent of the framers of the latter amendment to incorporate the first ten,[24] the practical effectuation of the same result through the steady process of selective incorporation initiated in *Gitlow* v. *New York*,[25] manifests a strong judicial policy towards nationalizing the Bill of Rights. During the quarter of a century since *Gitlow*, the personnel of the Court has undergone many changes; it has included such staunch defenders of federalism as Mr. Justice Frankfurter. Yet, during the entire *period the progress* towards nationalization has not been stayed and certainly not been reversed; not a single decision holding applicable to the states by virtue of the Fourteenth Amendment a right secured in the first ten has been overruled by

22. The states are Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Tennessee, Texas and Virginia. Bedau, p. 43; United Nations Report, Capital Punishment (ST/SOA/SD/9-10), p. 40 (hereinafter referred to as UN Report). The latter includes West Virginia but in 1965, after the UN compilation, that state abolished capital punishment in all cases. United States Department of Justice, National Prisoner Statistics, No. 42, June, 1968, p. 32 (hereinafter referred to as NPS). In Nevada, rape is punishable by death only where committed with substantial bodily harm to the victim. Nev. Rev. Stat. Sec. 200.363 (1967).

23. So classified by the Department of Justice. NPS, p. 9.

24. See *Adamson* v. *California*, 332 U.S. 46 (1947) (opinion by Mr. Justice Reed, concurring opinion by Mr. Justice Frankfurter and dissenting opinion by Mr. Justice Black).

25. 268 U.S. 652 (1925).

the Court or even modified to the extent of according greater liberality to the states in interpreting the scope of the right.[26]

The principle underlying *Gitlow* and its successors is that we are one indivisible nation with liberty and justice for all, and not merely for those fortunate enough to reside in some rather than other regions of the country. It is the principle that where the fundamental freedoms of the Bill of Rights are concerned (one of which is the freedom from cruelly excessive punishments) accidents of geography are irrelevant. So long as we are one nation, it is unacceptable that the right of a man, even a rapist, to live should depend on whether he committed the offense five feet north or five feet south of the Mason-Dixon line.

It is not merely in the many incorporation cases that the judicial policy negating geographical factors in applying constitutional freedoms is manifest. In *Brown* v. *Board of Education, supra,* the Court held that a Negro child attending public school in Topeka, Kansas has as much right not to be segregated as his cousin attending school in Denver or Minneapolis. In *Loving* v. *Virginia,* 388 U.S. 1 (1967), it held that the right of a Negro and white to marry each other is not dependent on whether they live in Richmond or in New York.

The thrust of *Baker* v. *Carr,* 369 U.S. 186 (1962) and its manifold progeny is that not only the right to vote but the value of one's vote may not be made dependent upon the

26. As suggested by Mr. Justice Jackson in *Beauharnais* v. *Illinois,* 343 U.S. 250, 288-295 (1952) and Mr. Justice Harlan in *Roth* v. *United States,* 354 U.S. 476 (1957).

geographical accident of whether he lives on a farm or in a city.

Perhaps most germane is *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964). In *Roth* v. *United States*, 354 U.S. 476, 489 (1957), this Court had held that the test for constitutionally unprotected obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." In *Jacobellis*, the Court held that the term "community standards" does not imply a determination of the constitutional question of obscenity in each case by the standards of the particular community from which the case arises, but that it refers to national rather than local standards. What the Court said in *Jacobellis* is, we submit, particularly relevant here (378 U.S. at 194-5):

> It is true that local communities throughout the land are in fact diverse, and that in cases such as this one the Court is confronted with the task of reconciling the rights of such communities with the rights of individuals. Communities vary, however, in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard for application of the Federal Constitution. The Court has regularly been compelled, in reviewing criminal convictions challenged under the Due Process Clause of the Fourteenth Amendment, to reconcile the conflicting rights of the local community which brought the prosecution and of the individual defendant. Such a task is admittedly difficult and delicate, but it is inherent in the Court's duty of determining whether a particular conviction worked a deprivation of rights guaranteed by the Federal Constitution. The Court has not shrunk

> from discharging that duty in other areas, and we see no reason why it should do so here. The Court has explicitly refused to tolerate a result whereby "the constitutional limits of free expression in the Nation would vary with state lines," Pennekamp v. Florida, supra, 323 U.S., at 335, we see even less justification for allowing such limits to vary with town or county lines. We thus reaffirm the position taken in Roth to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. *It is, after all, a national Constitution we are expounding.* (Emphasis added.)

If a community may not determine for itself what is obscene, it may not determine what is cruel and unusual. If restrictive local or regional standards may not determine the right of an American to speak, it certainly may not, we submit, determine his right to live.

It may be conceded that these decisions as well as one that forbids a state to impose the death penalty for rape impinge somewhat upon federalism strictly construed. But federalism, like government, is not an end but a means. We declared our independence of England because we believed that governments are instituted among men to secure their inalienable rights, of which first and foremost is the right to live, and that when a particular form of government fails to secure these rights, it is the form of government and not the rights which must yield.

It is no answer to say that application to particular geographic regions of national concepts of the meaning of freedoms secured by the Bill of Rights should be effected by constitutional amendment rather than court decision,

for it is the teaching of all the post-*Gitlow* decisions that this indeed is what was done in 1868. If the Fourteenth Amendment means anything, it means that a man's right to life or liberty cannot be made dependent upon local or regional standards but must be judged according to the standards of the entire nation. It is, after all, a national Constitution which secures this right.

F. Applicable Standards of Cruelty

As we have indicated, the ultimate authority to determine what constitutes constitutionally impermissible punishment rests with the courts. This is so because in a Federal system based upon a written constitution there must be some single agency which has the final responsibility of determining for the whole nation the meaning of that constitution. Ever since *Marbury* v. *Madison*, 1 Cranch 137 (1803), it has been established that this responsibility has been delegated to the judiciary. It is therefore the responsibility of this Court to adjudicate the appropriateness of the death penalty for rape.

In discharging this responsibility, members of the Court are not left without guides other than their own subjective predispositions. We do not urge the Court to reverse in the present case merely because its members may not like the idea of a person being put to death for a non-homicidal rape. We do not even urge that the penalty be adjudged unconstitutional because the Court deems it shocking to the conscience, although there is ample authority for this.[27] We believe that there are standards or criteria available

27. See, e.g., *Rochin* v. *California*, 342 U.S. 165 (1952); *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 471 (1947) (concurring opinion of Mr. Justice Frankfurter).

to the Court as reasonably objective as can be expected of a constitutional provision whose words necessarily "are not precise."[28]

We have heretofore urged rejection of such criteria as acceptability in 1789 or 1868, effectiveness as a deterrent, and contemporary acceptability in a particular geographic region. There are, however, other standards or criteria which are appropriate and it is to these that we now address ourselves.

Preliminarily, we note that the over-all principle was expressed by Mr. Chief Justice Warren in his plurality opinion in *Trop* v. *Dulles* (256 U.S. at 101). "The Amendment," he said, "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." The criteria we now propose will, we submit, aid the Court in determining whether the death penalty for non-homicidal rape is consistent with these "evolving standards of decency."

1. The cruelty of non-deterrent punishment

We have pointed out above (p. 16) that punishment may be constitutionally cruel even if it is effective as a deterrent and that accordingly if the death penalty were effective to deter rapes it nevertheless could still be violative of the Eighth Amendment. But, we suggest here, the converse does not follow; punishment which does not deter and does not serve any valid purpose at all (such as reformation) or any valid purpose which cannot effectively be served by less harsh means (such as isolation) is, we

28. *Trop* v. *Dulles*, 356 U.S. at 100.

submit, cruel and inhumane. This is so because its only purpose is vengeance,[29] and vengeance is forbidden by the Constitution.

Mr. Justice Brennan did not join in the Chief Justice's plurality opinion in *Trop* v. *Dulles*, but he expressed this principle well in his own concurring opinion. After con-

29. There is considerable empiric evidence to support the belief that vengeance is the purpose of the death penalty. Prison authorities uniformly search and guard condemned prisoners closely to prevent suicide. Should a prisoner in attempting suicide injure himself, no medical effort is spared to keep him alive for the scheduled execution. Gottlieb, *Capital Punishment*, 15 CRIME AND DELINQUENCY 8 (1969). It is apparently not the prisoner's death but the putting him to death that the state demands. Moreover, the prisoner must be conscious and sane at the time of the execution. Dr. William F. Graves, for many years medical officer at San Quentin, made some fifty visits on death row, examining each condemned inmate to determine his physical and mental status and to recommend any treatment that might be needed to keep him alive and sane for execution. Dr. Graves reports as follows regarding one condemned prisoner: "During his stay in Death Row, McCracken became no more than a vegetable. On one occasion, I found him wallowing on the floor of his cell in his own excreta babbling incoherently. I arranged to have him transferred to the prison hospital where he was given electric shock therapy—this to bring him to a point of sanity at which he might be considered able to understand that he was being punished at the time of his execution." *Ibid.*

That this practice is not limited to the United States is shown by the following from the UN report cited above (at p. 101): "There are provisions in the laws of many countries which allow the postponement of an execution in the event of either serious physical illness or insanity which appears after sentencing; the execution then takes place when the condemned man is in good health. Ironically, this practice sometimes results in the fact that the state expends considerable effort and funds to save the life of the man it will then proceed to kill. * * *" All this makes sense only in terms of vengeance; the culprit must be sane and conscious when the state puts him to death, else the state's vengeance would not be full.

The practice in ancient Israel, during the time when capital punishment was still effected, was the reverse. The condemned prisoner was given wine spiced with frankincense to drink in order to benumb his senses. *Talmud, Sanhedrin* 43a.

cluding that denationalization for desertion during wartime is ineffective as a deterrent, he stated (356 U.S. at 112):

> * * * It cannot be denied that there is implicit in this a certain rough justice. He who refuses to act as an American should no longer be an American—what could be fairer? But I cannot see that this is anything other that forcing retribution from the offender—naked vengeance. * * *

Mr. Justice Brennan did not join in the plurality opinion based on the Eighth Amendment presumably because the Government had "understandabl[y] * * * not pressed its case on the basis of expatriation of the deserter as punishment for his crime." (*Ibid.*) Had it done so, the tenor of his opinion and his joinder in the Court's opinion in *Robinson* v. *California, supra,* indicate quite clearly that he would likewise have held that non-deterrent, vengeful punishment is violative of the Eighth Amendment's prohibition of cruel and unusual punishment.

Mr. Justice Brennan pointed out in *Trop* that because of the novelty of expatriation as punishment no one can judge its precise consequences and he accordingly could not rely on any studies to establish its inefficacy as a deterrent.[30] Nevertheless, he concluded that since its efficacy had not been established, so grave a penalty could not constitutionally be imposed by Congress.

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30. He did, however, note that, from the fact that in two-thirds of the cases of the 21,000 soldiers convicted of desertion during World War II and sentenced to be dishonorably discharged, reviewing authorities remitted the dishonorable discharges, "it is possible to infer that the military itself had no firm belief in the deterrent effects of expatriation." 358 U.S. 112, n. 8.

In respect to capital punishment, however, substantial studies have been made by competent scholars and their conclusion is overwhelming that statistical research does not support the assumption that the death penalty is more effective as a deterrent than life or long-term imprisonment and that it is the certainty rather than the gravity of the punishment that is critical in deterrence.[31] (Indeed, the only contrary assertions are unsupported, impressionistic statements mainly from law enforcement officials.[32]) Some of the scholars assert flatly that the death penalty, as distinguished from imprisonment, is not a deterrent;[33] or may even have a contrary effect and actually incite commission

31. Sellin, *The Death Penalty*, 19-63 (1959); Sellin, *Capital Punishment*, 135-186 (1967); Calvert, *Capital Punishment in the Twentieth Century*, 51-90 (1928); Mattick, *The Unexamined Death*, 8-28 (1966); Koeninger, *Capital Punishment in Texas*, 1924-1968, 15 CRIME AND DELINQUENCY (1969) 132; Sellin, *Does the Death Penalty Protect Municipal Police?* in Bedau, 284; Campion, *Does the Death Penalty Protect State Police?* in *ibid.* 301; Savitz, *The Deterrent Effect of Capital Punishment in Philadelphia*, in *ibid.*, p. 315; Graves, *The Deterrent Effect of Capital Punishment in California*, *ibid.*, p. 322; Royal Commission on Capital Punishment, *Report* (1953), sections 65, 67-68; Reckless, *The Use of the Death Penalty*, 15 CRIME AND DELINQUENCY 52-56 (1969); McCafferty, *Major Trends in the Use of Capital Punishment*, FEDERAL PROBATION, Sept. 1961, pp. 15-21.

32. Hoover, *Statements in Favor of the Death Penalty*, in Bedau, 130; Allen, *Capital Punishment: Your Protection and Mine*, *id.*, 135. But not all law enforcement officials agree. See, e.g., Statement of Attorney General Ramsey Clark on S. 1760, Dept. of Justice Release, July 2, 1968. Correction officials, moreover, appear very predominantly to be of the opinion that capital punishment has no significant deterrent effect; Thomas, *Attitudes of Wardens Towards the Death Penalty*, in Bedau, 242; Gottlieb, *Capital Punishment*, 15 CRIME AND DELINQUENCY 13 (1969).

33. Professor Sellin, for example, has asserted positively that there is evidence for the view that imprisonment is as good a deterrent as the death penalty. Bedau, 264. So too has Koeninger, *Crime and Punishment in Texas*, 15 CRIME AND DELINQUENCY 132, 141 (1969) ("The death penalty for murder in Texas has not been a deterrent.")

of the very crime it seeks to deter.[34] More cautious scholars say only that there is no evidence to support the theory that the death penalty is a deterrent superior to imprisonment.[35] But even accepting the latter view, we submit, in harmony with Mr. Justice Brennan's position in *Trop v. Dulles*, that where the consequences of a choice of penalties is so grave, the Constitution requires some evidence to support the choice made and does not sanction the staking of a man's life on a guess.

In sum, we submit that in the absence of at least some convincing evidence that the death penalty for rape does actually deter other rapes to an extent greater than life or long term imprisonment, the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment.

2. *The death penalty for rape as a badge of slavery*

Every relevant study indicates a strong relation between the death penalty and poverty; for the crime that sends the poor man to the death chamber, the well-to-do, if convicted at all, is most likely to go to prison. Dean Macnamara of the New York Institute of Criminology was perhaps over-dramatic in stating that "It may be exceedingly difficult for a rich man to enter the Kingdom of Heaven but case after case bears witness that it is virtually impos-

34. Sellin, *The Death Penalty* (1959), 65-69; Scott, *A History of Capital Punishment* (1950), p. 246; Massachusetts, Report on the Death Penalty (1958), 27-28; Ohio, *Report on Capital Punishment* (1961), 89; Roche, *A Psychiatrist Looks at the Death Penalty*, The Prison Journal (Oct. 1958), p. 47.

35. See authorities cited in footnote 25. Reckless sums it up as follows: "What do all these studies, taken together, seem to show? The results are negative; there is no evidence to support the theory that the death penalty is a deterrent superior to imprisonment *for the crime of murder*" (p. 364).

sible for him to enter the execution chamber,"[36] but the substantial truth of the statement is supported by all the authorities,[37] and is conceded even by those favoring retention of capital punishment.[38]

The death penalty is not only a function of poverty, it is also a function of race. There is substantial evidence and agreement among the authorities that racial discrimination is a significant factor in the imposition and execution of the death sentence.[39] Attorney General Ramsey Clark

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36. Macnamara, STATEMENT AGAINST CAPITAL PUNISHMENT, in Bedau, 188. See also, Ehrmann, THE HUMAN SIDE OF CAPITAL PUNISHMENT, in Bedau, p. 510. "It is difficult to find cases where persons of means or social position have been executed. Defendants indicted for capital offenses who are able to employ expert legal counsel throughout their trials are almost certain to avoid death penalties. In the famous Finch-Tregoff case in California, there were three trials, two hung juries, and finally verdicts of guilty but *without* the death penalty. It is estimated that the cost of these trials was over $1 million. But in the trial of some defendants without funds, juries have deliberated for as little as nineteen minutes, or an hour more or less, and then returned verdicts of guilty and death."

37. Duffy and Hirshberg, 88 MEN AND WOMEN (1962), p. 258; LaSalle, *Capital Punishment and Clemency*, 25 OHIO STATE L. J. 71, 72 (1964); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957); Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME AND DELINQUENCY 141 (1969); Statement of Attorney General Ramsey Clark on S. 1760, July 2, 1968; Wolfgang, Kelly and Nolde, EXECUTIONS AND COMMUTATIONS IN PENNSYLVANIA, in Bedau, 482-483; Ehrmann, THE HUMAN SIDE OF CAPITAL PUNISHMENT, in Bedau, 510-511; Mulligan, *Death, The Poor Man's Penalty*, THE AMERICAN WEEKLY, May 15, 1960, p. 9.

38. E.g., Allen, CAPITAL PUNISHMENT: YOUR PROTECTION AND MINE, in Bedau, 138.

39. Wolfgang, Kelly and Nolde, EXECUTIONS AND COMMUTATIONS IN PENNSYLVANIA, in Bedau, 473-477; Macnamara, Statement Against Capital Punishment, in *ibid* 188; Murton, *Treatment of Condemned Prisoners*, 15 CRIME AND DELINQUENCY 320, (1969); Gottlieb, *Research Note on Inter- and Intra-Racial Homicides*, 20 SOCIAL FORCES 361 (1959); Johnson, *The Negro and Crime*, 271 Annals 93 (1951). See also authorities cited in footnote 31, *supra*.

stated quite categorically in testifying before the Senate Subcommittee of the Judiciary on S. 1760 (July 2, 1968) that "racial discrimination occurs in the administration of capital punishment." By no means untypical is the following finding in a study of capital punishment in Texas: "In several instances where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty."[40]

The positive relationship between the death penalty and race is strong, but where the crime involved is rape and more particularly, as in the present case, the rape of a white woman by a Negro, the relationship is almost uncontrovertible. The statistics of the Department of Justice show that in the United States in the period from 1930 to 1967 the percentage of whites and Negroes among those executed was, respectively, for murder, 49.9 and 48.9; for crimes other than murder and rape, 55.7 and 44.3; *for rape, 19.6 and 89.1*.[41]

In 1954, the Court in *Brown* v. *Board of Education*, *supra*, declared racial segregation in the public schools to be unconstitutional. In 1962, the petitioner herein was condemned to death for the rape of a white woman. A comparison of the states whose statutes in 1954 required or authorized racial segregation in the schools and those

40 Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 Crime and Delinquency 141 (1969).

41 NPS, p. 7. An independent study made of Texas for the years 1924 to 1965 shows for murder the relative percentage of whites and Negroes were respectively 46 and 55, while for rape, they were 11 and 83. Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 Crime and Delinquency 140 (1969).

which in 1962 authorized[42] the death penalty (and with the exception of West Virginia still do) for rape is, we believe, of great significance:

Segregation States[43]	*Death Penalty States*[44]
Alabama	Alabama
Arizona	
Arkansas	Arkansas
Delaware	Delaware
District of Columbia	District of Columbia
Florida	Florida
Georgia	Georgia
Kansas	
Kentucky	Kentucky
Louisiana	Louisiana
Maryland	Maryland
Mississippi	Mississippi
Missouri	Missouri
	Nevada
New Mexico	
North Carolina	North Carolina
Oklahoma	Oklahoma
South Carolina	South Carolina
Tennessee	Tennessee[45]
Texas	Texas
Virginia	Virginia
West Virginia	West Virginia
Wyoming	

42. In no state is the death sentence for rape mandatory; otherwise a white charged with rape would have to be either acquitted or, as rarely happens, be sentenced to death. See Bedau, p. 413.

43. Murray, STATES LAWS ON RACE AND COLOR, Supp. (1955), p. 6.

44. *Supra*, note 22.

45. In 1915, Tennessee abolished capital punishment for all crimes *except rape*. Bedau, p. 413.

With the exception of Nevada (where the death penalty is permissible only if the rape is accompanied by substantial bodily harm to the victim[46] and where in any event the statute is a dead letter, no person having been executed under it at least since 1930)[47] *every state (including the District of Columbia) which authorizes the death penalty for rape required or authorized racial segregation in the public schools until it was declared unconstitutional.* Conversely, of the 22 states which required or authorized racial segregation in the public schools, all but three (Arizona, Kansas and Wyoming) authorized the death penalty for rape.

This almost one for one relationship between racial segregation and death penalty statutes for rape as well as other statistical and empiric evidence, can be explained in no other way than in terms of racial discrimination. This is the practically unanimous conclusion of the competent scholars who have studied the problem.[48] Thus, Koeninger, reporting on a Texas study, asserts: "The Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas the whites and Latins are far more likely to get a term sentence than the death penalty."[49] Bedau states (at p. 413) that

> * * * as the *National Prison Statistics* shows of the nineteen jurisdictions that have executed men for rape since 1930, a third of them have executed only Negroes.

46. *Supra*, note 22.

47. NPS, p. 11.

48. Bedau, p. 60; Ehrmann, THE HUMAN SIDE OF PUNISHMENT, in Bedau, p. 511. See also authorities cited in note 39, *supra*.

49. 15 CRIME AND DELINQUENCY 141 (1969).

> In these six states, the very existence of rape as a crime with optional death penalty is, in the light of the way it has been used, a strong evidence of an original intent to discriminate against non-whites.

At the request of the NAACP Legal Defense and Education Fund, Professor Marvin E. Wolfgang undertook an independent investigation of the relationship of the death penalty to race in rape cases. Dr. Wolfgang's findings, which accorded with those of all the other scholars, were presented to the District Court in this case in support of a claim of denial of equal protection, but that court and the Court of Appeals were unpersuaded, primarily because the study did not encompass the particular county (Garland) wherein the present case was tried. The courts apparently believed that the fact that juries in other counties act discriminatorily in imposing the death sentence does not justify an inference that the jury in the present case followed the general pattern.

In view of the limited nature of the certiorari allowed in this case, the equal protection question and the correctness of the decision of the lower courts on that specific question are not now open to review. Petitioner, however, offers Dr. Wolfgang's findings to this Court on another ground which is before it, namely, that unbridled discretion on the part of a jury in fixing the penalty for rape usually if not inevitably results in racial discrimination and hence is arbitrary and a deprivation of due process.

We offer Dr. Wolfgang's findings as well as the statistical and other scholarly studies to this Court on an analogous but somewhat different basis. We suggest that if a

white man found guilty of rape is rarely sentenced to death, or if sentenced is rarely executed, then the death sentence for a Negro convicted of the same crime may truly be said to be an "unusual" punishment, and hence violative of the Eighth Amendment. We suggest too another approach. In *Robinson* v. *California, supra*, the Court held that to punish a person for a status (drug addiction) which he cannot control violates the Eighth Amendment.[50] The same reasoning makes violative of the Amendment the imposition on a person of a penalty harsher than ordinarily imposed simply because of a status (the color of his skin) which he cannot control.

It is true, of course, that neither the Wolfgang study nor the National Prisoner Statistics or the scholarly studies which have been cited herein specifically pinpoint Garland County in Arkansas, and it is conceivable that the jury which condemned the petitioner to death did not share the general feelings regarding the rape of a white woman by a Negro prevalent in all the states which authorize the death penalty for rape. But the Constitution does not require the courts to ignore what everyone knows or to close their eyes to what everyone sees. Certainly, when human life is at stake the courts have not merely the right but an obligation to act on the basis of probability rather than remote possibility.

In *Brown* v. *Board of Education, supra*, the Court in holding racial segregation in *all* schools to be unconstitu-

50. In *Powell* v. *Texas*, 392 U.S. 514 (1968), the Court found an absence of evidence in the record to support the claim that being drunk in a public place was a status entirely uncontrollable by the defendant, but in no way impaired the authority of *Robinson*.

tional relied upon scholarly studies that such segregation causes psychological harm to Negro children. Yet, none of the cited studies pinpointed Topeka, Kansas, nor was any other evidence presented to show that the Negro children in that school district suffered any hurt from the compulsory segregation. The Court had held at least a *prima facie* denial of equal protection on the basis of statistical evidence of the exclusion of minority groups from juries even though there was no evidence that the particularly all-white jury which convicted the defendant whose case was being considered was motivated by racial considerations.[51]

The genius of the Anglo-American system of law is that in a criminal case every reasonable doubt must be resolved in favor of the accused. This is especially true where a human life is at stake. Here far more than a reasonable doubt is present that the petitioner's death sentence was unmotivated by racial considerations. This should be more than enough to bar the extinguishment of his life.

3. The death penalty and the national conscience

We have suggested (*supra*, pp. 17-21) that local or regional standards are not the appropriate measure to determine whether the death penalty constitutes cruel and unusual punishment within the purview of the Eighth Amendment, and that fundamental rights secured by a national constitution must be applied nationally. We submit that viewed nationally "the evolving standards of decency that mark the progress of a maturing society"[52] clearly point to the elimination of the death penalty in the United States.

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51. See, e.g., *Hernandez* v. *Texas*, 347 U.S. 475 (1954).

52. *Trop* v. *Dulles*; 256 U.S. at 101.

Although general public opinion has fluctuated over the years, the trend is strongly toward abolition. Where informed public opinion is concerned, opposition to capital punishment is overwhelming (with the exception of professional law enforcement officials, but not correction officials). Bedau (at p. 236) summarizes the public opinion and attitude surveys as follows:

> * * * It seems fairly probable that: (1) psychiatrists, penologists and possibly social scientists and social workers generally, as well as higher government officials, tend to oppose the death penalty in this country at this time; law enforcement officers tend to favor it. The strength of these divergent attitudes is about equally pronounced. The general public shows a steadily growing trend to doubt the death penalty and to favor abolishing it. * * *

Better than any other agency in a society its religious groups reflect its conscience. The six constituents of the Synagogue Council of America, in whose behalf this brief is submitted, can fairly be said to represent American Judaism, and all favor abolition of capital punishment. Some of the others in the rapidly growing number of religious groups on record as opposed to capital punishment are: American Baptist Convention; American Evangelical Lutheran Church; Augustana Evangelical Lutheran Church of North America; California-Nevada Conference of Methodists; Christian Churches (Disciples of Christ) International Convention; Church of the Brethren; Church Federation of Greater Chicago; Congregational Conference of Southern California and the Southwest; Connecticut Valley Presbytery; Connecticut Valley Quarterly Meeting of Friends (Quakers); Connecticut Universalist

Convention; Greater Red Bank Area Council of Churches; Massachusetts Baptist Convention; Massachusetts Council of Churches; New York State Council of Churches; Northern California and Nevada Council of Churches; Protestant Episcopal Church in the United States of America; Protestant Episcopal Church, Diocese of Massachusetts; Southern California Council of Churches; Southern California-Arizona Conference of the Methodist Church; United Presbyterian Church in the United States of America-General Assembly; Universalist Church of America.[53]

Legislative action reflects this trend. In the past five years, five states (Iowa, New York, Oregon, West Virginia and Vermont) have abolished the death penalty.[54] In addition, the United States Department of Justice has urged Congress to abolish the death penalty in places under its jurisdiction.[55] But the statute books do not tell the full story. Nevada, as we have noted, has never legislatively abolished the death penalty for rape; yet not a single person has been executed in that state for rape in at least forty years. There is hardly a state in the Union which does not carry on its books laws which have long become archaic and obsolete. In gauging standards, the *de facto* is more significant than the *de jure*.[56]

An examination of what actually has been happening shows clearly that the death penalty has really become an

53. Ehrmann, THE HUMAN SIDE OF CAPITAL PUNISHMENT, in Bedau, pp. 515-516. This listing is far from exhaustive.

54. Bedau, p. 12.

55. Statement by Attorney General Ramsey Clark on S. 1760 (July 2, 1968).

56. *Cf. Poe* v. *Ullman*, 367 U.S. 497 (1961).

"unusual" punishment. The number of persons executed within the United States in the years 1930, 1940, 1950 and from 1960 to the present as reported by the Federal Bureau of Prisons[57] are shown in the following table:

1930—155
1940—124
1950— 82
1960— 56
1961— 42
1962— 47
1963— 21
1964— 15
1965— 7
1966— 1
1967— 2
1968— 0
1969— 0

It is true that some of the decrease may be explained by decisions of this Court[58] and the activities of such organizations as the NAACP Legal Defense and Educational Fund and the National Office for the Rights of the Indigent seeking to make available to poor persons some of the legal services available to the well-to-do, so that some who earlier would have gone to the death chamber with little legal opposition are now better able to use the law to preserve their lives. It is also true that, as of the beginning of 1968, there were 435 persons on death rows throughout the nation[59] and that since then many additional death

57. NPS, p. 7 (updated).

58. E.g., *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

59. NPS, p. 13.

sentences have been handed down, so that in the event the present appeal and others that are on their way to this Court are unsuccessful some of these persons will be executed. Nevertheless, the steady decline in the number of persons executed during the past four decades can be explained only in terms of a widely held belief that the death penalty is basically cruel and morally unacceptable.

The conclusions drawn in this section and the statistical and other factual information cited to support them all deal with the death penalty generally, that is even for premeditated murder. We do not in this brief urge a decision that capital punishment is in all cases cruel and unusual punishment violative of the Eighth Amendment. We urge only that the death penalty for non-homicidal rape does violate the Constitution. In considering this narrower issue, it should be noted that, even if measured by what the statute books say rather than by what is actually done, the national standard quite clearly rejects capital punishment for rape; the overwhelming majority of Americans live in states whose laws do not permit a judge or jury to sentence a person convicted of rape to death. Measured by the test set forth in *Trop* v. *Dulles,* this Court, we submit, can come to no other conclusion than that the time has arrived judicially to declare that the death penalty for non-homicidal rape does not comport with the present standards of national decency and therefore is violative of the Eighth Amendment.

4. International standards

A democracy, our Declaration of Independence asserts, imposes upon its people an obligation to accord a decent respect to the opinions of mankind. We suggest that in

deciding whether capital punishment for rape is consistent with evolving standards of decency, this Court can and should accord respect to the opinion of mankind. This is by no means unprecedented. In *Trop* v. *Dulles*, Mr. Chief Justice Warren noted that "The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime." 356 U.S. at 102. He referred to a United Nations' survey of the nationality laws of 84 nations of the world which revealed that only two countries, the Phillippines and Turkey, imposed denationalization as a penalty for desertion, and at least partly on the basis of this fact he held denationalization to constitute cruel and unusual punishment. 356 U.S. at 103.

What is true of denationalization is equally true at least in respect to capital punishment for non-homicidal rape.

We have quoted Bedau's summary of American attitudes to the death penalty generally.[60] World opinion, as indicated in a survey made under the auspices of the Department of Economic and Social Affairs of the United Nations, is almost exactly the same. The UN reports as follows:[61]

> In the first place, it will be noted that, among the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favor the retention of capital punishment. The specialists of the social sciences, criminologists, sociologists, penologists, psychologists, doctors and writers on social

60. *Supra*, p. 34.

61. UN Report, p. 64. See, also, Ancel, *Capital Punishment in the Second Half of the Twentieth Century*, The Review (International Commission of Jurists), June 1969, 33.

science and criminology are, in their great majority, abolitionists. The supporters of capital punishment, apart from a number of political figures and persons holding high public office, are generally jurists with a traditional training and judges.

It should be noted that here too the reference is to capital punishment generally, even for premeditated murder. When capital punishment for non-homicidal rape is involved, world revulsion is even clearer. The United Nations' survey shows that of the sixty-five nations that responded to its inquiries, only four (other than the seventeen states in the United States cited above)[62] still permit imposition of the death penalty for rape.[63] There is, we suggest, significance in the identity of the four which still maintain the death penalty for rape. The four are the Republic of China, Northern Rhodesia, Nyasaland, and the Republic of South Africa. In respect to South Africa and Rhodesia whose policy of apartheid and discrimination is notorious, it is fairly certain that racial considerations are the prime factor in the imposition of the penalty of death for rape.

We submit that the evolving standards of civilized decency in the nations of the world no less than in the United States call for a declaration by this Court that the death penalty for non-homicidal rape constitutes constitutionally impermissible cruel and unusual punishment.

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62. *Supra*, p. 29.

63. UN Report, p. 40.

Conclusion

All the evidence points to the conclusion that capital punishment is on its way out. It is but a matter of time before the laws authorizing it are repealed or become dead letters. The reason for this is that it no longer comports with "the evolving standards of decency that mark the progress of a maturing society," and this will become increasingly obvious in the coming years.

Why, then, should not the Court abstain and let time resolve the issue? First, because when constitutional rights, particularly those that are fundamental, are violated, they should be vindicated promptly.

Thus, in 1966, it was quite clear that the poll tax in state elections was on its way out and had but few years of survival; yet that fact did not deter this Court from declaring it unconstitutional in the very few states which still retained it.[64] Occasionally, as in the case of racial segregation in the schools, the Court has felt that prompt vindication is impracticable and has contented itself with decreeing effectuation of its decision with all deliberate speed.[65] Looking backwards, it is by no means certain that a judgment ordering reasonably prompt compliance with the constitutional mandate would not have worked better.

But whatever the case may be with respect to school segregation, no practical considerations dictate delay in declaring constitutional rights under the Eighth Amendment. The Court's judgment will require no complex restructuring of communal institutions. As in the case of the poll tax, the judgment will be self-executing.

64. *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966).

65. *Brown* v. *Board of Education,* 349 U.S. 294 (1955).

But, more important by far, until such time as the slow wheels of legislative reform catch up with the national conscience, human lives in an amount which cannot be foretold, will have been extinguished. We who submit this brief borrow from our Jewish tradition in noting that our Rabbis taught us that he who destroys one life, it is as though he destroyed the whole world; while he who sustains one life it as though he sustained the entire world.[66] This, we believe, applies even to the life of a rapist.

In *Trop* v. *Dulles*, 356 U.S. at 100, Mr. Chief Justice Warren stated that "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." These standards, we submit, require the Court to declare at this time that the death penalty for non-homicidal rape affronts the dignity of man, does not comport with civilized standards and cannot be sustained under the Eighth Amendment.

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66. *Talmud, Sanhedrin*, ch. 4, Mishnah 5.